LEMBAGA AKITEK MALAYSIA

v.

CHEAH KIM FAH & ORS

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
ABDUL MALEK AHMAD JCA
DENIS ONG JCA
[CIVIL APPEAL NO: A-02-647-1997]
17 MARCH 1999

PROFESSIONS: *Architects - Specially authorised person - Definition of - Architects Ordinance 1951, ss. 2, 6(1)(f), (2) - Person approved by building authority - Registration of approval - Whether must be endorsed in certificate of registration - Recognition by Board*

The respondents were registered with the appellant Board and had had endorsed in their respective certificates of registration the various building authorities which approved them for registration.

The respondents were subsequently approved by building authorities other than those that were endorsed on their certificates of registration. However, the respondents failed to give the appellant notice of these other authorities and hence their respective certificates of registration did not authorise them to submit building plans to these other authorities.

The issue before the court was whether the respondents, having been registered under the Architects Ordinance 1951 ('the said Ordinance') pursuant to s. 6(1)(f) thereof, were required to submit to the appellant subsequent approvals for registration from other building or local authorities. Also, whether the appellant was legally bound under the Architects Act 1967 ('the said Act') to give cognisance and approval to the registration of those other building authorities which were not included in the certificates of registration of the respondents.

Held:
Per Abdul Malek Ahmad JCA:

[1] A person desirous of being "a specially authorised person" needs firstly, to get the approval of a building authority and secondly, to get that approval registered. Obtaining approval without getting registered for that particular approval will not be sufficient for the purpose of being recognised as a specially authorised person.

[2] The certificates of registration of the respondents were not complete as subsequent approvals by certain building authorities had not been included. Such subsequent approvals may be added either immediately or when the certificates of registration are renewed each year.

[3] The certificate of registration of a specially authorised person must contain a list of all the building authorities from which he has obtained approval. A specially authorised person cannot expect the Board to recognise a building authority that has given approval but is not endorsed in the certificate of registration.

[Appeal allowed.]

Legislation referred to:
Architects Act 1967, ss. 2, 24
Architects Ordinance 1951, ss. 2, 6(1)(f), (2), 13
Engineers Act 1967, s. 8(2)
Limitation Act 1953, s. 6(1)(b)
Rules of the High Court 1980, O. 15 rr. 4(1)(b), 6
Specific Relief Act 1950, s. 44

For the appellant - M Pathmanathan; M/s Yusof Khan & Pathmanathan
For the respondents - NT Rajah (V Segaran with him); M/s Maxwell Kenion Cowdy & Jones

[Appeal from High Court, Ipoh; Civil Suit No: 22-81-1990]

Reported by Ling Hea Hoon

JUDGMENT

Abdul Malek Ahmad JCA:

The forerunner to the Architects Act 1967 (hereinafter "the Act") was the Architects Ordinance 1951 (hereinafter "the Ordinance") where in s. 2 the definition of "specially authorised person" was "a person who is registered under para. (f) of sub-s. (1) of s. 6 of the Ordinance".

Reproduction of the whole of s. 6 of the Ordinance is necessary for our purpose and it reads as follows:

> 6.(1) Subject to the provisions of this Ordinance, the following persons shall be **entitled to be registered under this Ordinance** –
>
> (a) any person who, on the date of application for registration under this Ordinance, is registered as an Architect under the Architects (Registration) Acts of the United Kingdom, 1931 and 1938;

(b) any person who, on the date of application for registration under this Ordinance, is registered as an Architect in Register No. 1 under the Architects Ordinance, 1941, and who, on the commencement of this Ordinance, is practising the profession of architect in the Federation;

(c) any person who has passed an examination which qualifies him for candidature as an Associate of the Royal Institute of British Architects;

(d) any person who has passed an examination held under paragraph (a) of section 4 of this Ordinance;

(e) any person who satisfies the Minister that he was practising as an architect in the Federation at the date of the coming into force of this Ordinance and who makes application for registration under this Ordinance within two years of such date; and

(f) **any person not otherwise qualified under any of the foregoing paragraphs of this sub-section who has been approved by a building authority for registration under this Ordinance.**

(2) **A specially authorised person may submit plans only to, and within the limits of, the building authority which has approved him for registration.**

In our view, however, the only provisions in the said section relevant to this appeal would be, as earlier underlined by us, the opening lines of sub-s. (1) in particular the words "entitled to be registered under this Ordinance", para. (f) of sub-s. (1) (hereinafter "the approving paragraph"), and sub-s. (2). Essentially, the effect of these three provisions is that a person who has been approved by a building authority for registration under the Ordinance shall be entitled to be so registered but he may submit plans only to, and within the limits of, the building authority which has approved him for registration.

Subsequently, s. 2 of the Act, which only came into force as a revised Act on 1 October 1973, has the following definition of "Building Draughtsman":

"Building Draughtsman" means –

(a) any person who immediately before the appointed date was a specially authorised person within the meaning of the Architects Ordinance, 1951, registered under Part II of the register kept and maintained under that Ordinance but shall not include any person qualified for registration under the Registration of Engineers Act, 1967, or the Registration of Surveyors Act, 1967; and

(b) any other person whom the Board in its absolute discretion may deem desirable to register having regard to his qualification and experience and to the requirements of any Building Authority.

Against this backdrop, we will now examine the registration details of the respondents. Actually, only the first three respondents are involved in this appeal as from the notes of proceedings in the court below, it has been stated that the fourth respondent had lost interest after the filing of the action. This fact has been brought to our attention by learned counsel for the respondents when he started his submissions before us and this was promptly confirmed by learned counsel for the appellant. Hence, any reference to the respondents hereafter would mean only the first three respondents.

Learned counsel for the appellant argued that the action was actually out of time in view of para. (b) of sub-s. (1) of s. 6 of the Limitation Act 1953 which provides that an action to enforce a recognisance shall not be brought after the expiration of six years from the date on which the cause of action accrued which they said was in 1975.

We could, however, find no concrete evidence in the records that the appellant had rejected certificates of registration of the respondents in 1975. Further, no action was actually taken out by the appellant against the respondents until late 1989 when they threatened to take disciplinary action against them after which in 1990 the respondents had filed the present action. In the meantime, the respondents had continued to submit plans to the building authorities as they had done prior to 1973. On that premise, we were not convinced that the breach occurred in 1975 and would regard the limitation issue as being devoid of any merit. We are of course fortified in our finding by the fact, as stated earlier, that the appellant threatened the respondents with disciplinary action only in late 1989 and since this formed the basis of the action brought by the respondents, we would hold that they were not actually out of time.

The respondents were already registered under the Ordinance, according to their learned counsel, and there was no requirement either under the Ordinance or the relevant Rules to submit to the Board subsequent approvals for registration from other local authorities. It is this line of thinking on the part of the respondents that had made the relevant action quite necessary.

Learned counsel referred to the relevant excerpt from the notes of evidence recorded in the court below where the first respondent under re-examination by counsel on 17 September 1996 said:

> There is no provision for subsequent approvals granted by local authorities to be registered. Refers to Letter dated 27.10.75 from the Board of Architects written to Solicitors for plaintiffs. The letter states that the Board was seeking clarification from the Attorney-General Office – produced and marked as P2.

The four page opinion of the Attorney-General's Chambers had been included in the appeal record and, for purposes of brevity and ease of reference, the relevant portion states:

There was, however, no provision either in the Architects Ordinance, 1951 or in the Architects Rules, 1955 for the approvals of such additional Building Authorities to be notified to the Board established under the said Ordinance or for the Certificate of Registration to be amended to include in the Certificate such additional Building Authorities. This was necessarily so, because section 6(1)(f) of the Ordinance provided for the registration of a person "who **has been** approved by a building authority for registration under the Ordinance".

Consequently, sub-section (2) of the said section 6 provided that "a specially authorised person may submit plans only to, and within the limits of, the building authority which **has approved him for registration**." This clearly refers to an approval granted prior to the registration under section 6(1)(f) of the Ordinance. There is no provision for an approval for registration under the Ordinance to be granted after the registration; in fact, any such provision would have been a contradiction in terms, as there can be no question of an "approval for registration" being granted by a Building Authority after a registration has been effected. Therefore, any approvals for submissions of plans which may have been granted by any Building Authority to a person registered under section 6(1)(f) of the Ordinance **after** such registration would be *ultra vires* the Ordinance, and, as such, cannot bind the present Board of Architects to include such Building Authorities in granting registration as a Building Draughtsman under the Act.

6. However, under sub-section (2) of section 24 of the Act, the Board is empowered, *inter alia*, to receive and consider applications for the addition of Building Authorities to those specified in the registration of a Building Draughtsman. Therefore, if the registered Building Draughtsman in question make applications under section 24(2) of the Act for the addition of the Building Authorities which had approved them for submission of plans subsequent to their registration under section 6(1)(f) of the Ordinance, it would be entirely within the competency of the Board to grant such applications. In fact, it would seem that discretion should be exercised in their favour as the Building Authorities in question appear to have approved them for submission of plans in the genuine belief that they were authorised to grant such approval, and the Building Draughtsmen (then known as specially authorized persons) had accepted such approvals and carried on business and practice in relation to such Building Authorities in good faith. Besides, it would appear that under the Architects Ordinance, 1951 it was not illegal for persons not registered under the Ordinance to submit building plans to local authorities so long as they did not contravene section 11(1) of that Ordinance, the only disability imposed upon them being disentitlement to recover charges or remuneration in a Court.

7. I observe that it is also contended by some of the Building Draughtsmen that they were authorised by some of the Building Authorities to submit plans without any restrictions and they claim that by virtue of the proviso set out at the end of sub-section (5) of section 24 they are entitled to registration as

> Building Draughtsmen under the Act without the imposition of restrictions in respect of such Building Authorities. Their contention in this regard is valid provided the Building Authorities in question were listed in the Certificate of Registration granted in the Form in Schedule "D" to the Architects Rules, 1955. It will be observed from the terms of this Certificate that a specially authorized person was entitled to submit plans to the Building Authorities listed thereunder "**in accordance** with such restrictions as may be laid down by such building authorities."

For reasons to be stated later in this judgment and with due respect to the otherwise highly regarded opinion writer, we were unanimous in holding that he had fallen into error by the approach taken because it is our finding that for every approval by a particular building authority, that approval must be registered.

The problem becomes more acute when we find, as learned counsel for the respondents had submitted, other local authorities which had also given their approvals but had not been included in the certificates of registration under the Ordinance and consequently even in the certificates of registration issued under the Act.

The only problem before us, as we see it, has been stated by the learned trial judge in his judgment as follows:

> However over a period of time these specially authorised persons have secured approvals for submission of plans from other Building Authorities, in addition(al) to those listed in their original certificate of Registration. The moot point is whether the Defendants are legally bound under the Act to give cognizance and approval for the registration of these Building Authorities which were not included in the certificate of Registration of the plaintiffs.
>
> It is an indisputable fact that these approvals of other Building Authorities, besides those listed in the certificate of registration, were obtained only after the said certificates of registration were issued. In my view there is no provision in the Architects Rules 1955 or in the Architects Ordinance for the approval of such **additional** Building Authorities to be notified to the Defendants.

It is abundantly clear from these two paragraphs that the learned trial judge had also made the same mistake.

The facts are not exactly in dispute. As stated by learned counsel for the appellant in his submissions in the court below:

> It is common ground that all the 4 Plaintiffs were registered with the Board and had endorsed in their respective certificates of registration the various building authorities that had approved them for registration **and** whose registration the 4 Plaintiffs had lodged with the Board.

> It is also common ground that the 4 Plaintiffs were approved by building authorities other than those that were endorsed on their certificates of registration. The 4 Plaintiffs however failed to give the Board notice of these other authorities and hence their respective certificates of registration did not authorise them to submit plans to these other authorities.

Learned counsel for the respondents in his written submissions to the learned trial judge confirmed, with listed particulars, that not all building authorities which had given their approvals had been included in the relevant certificates of registration.

Having referred to the relevant provisions in the Ordinance, we take the view that each of the respondents is a specially authorised person under the Ordinance which term is defined in s. 2 thereof as a person who is entitled to be registered under the approving paragraph after being approved by the relevant building authority for registration under the Ordinance. Consequently, that specially authorised person may submit the plans only to and within the limits of the building authority which has approved him for registration.

What does this mean? To us, it means that a person, who is not otherwise qualified to be an architect by the other means provided in the said s. 6 of the Ordinance, may obtain approval from a building authority to be registered as a specially authorised person and functioning as such, he can only submit plans to and only within the limits of the building authority which had approved him for registration. Logically, it would mean that every approval has to be registered. This is because a person who is desirous of being a specially authorised person needs to do two things – firstly to get approval from a particular building authority and secondly to get that approval registered. Getting approved without getting registered for that particular approval would not be, in our view, sufficient to be recognised as a specially authorised person. What good would the certificate of registration be if the relevant building authority which had given approval is not included?

It is apparent, therefore, that the certificates of registration of the respondents were not complete as subsequent approvals of certain building authorities had not been included. It must be observed here that subsequent approvals may be added either immediately or when the certificates of registration are renewed every calendar year by virtue of s. 13 of the Ordinance. The purpose of renewal, in fact, would be a convenient way to update the particulars even if the addition has not been done promptly.

With the coming into force of the Act on 1 October 1973, local authorities were no longer involved. Section 24 of the Act, especially the first proviso, then becomes relevant. The said section, reproduced below in toto with the first proviso underlined, reads:

24.(1) Upon the registration of a Building Draughtsman the following restrictions shall apply –

(a) he may submit plans only to, and within the limits of the Building Authority for which area his application for registration has been approved; and

(b) he shall be entitled to submit plans of buildings only in accordance with the restrictions specified in subsection (5) as may be imposed by the Board.

(2) The Board may at any time on the application of a registered Building Draughtsman vary the restrictions for the time being imposed upon him pursuant to subsection (1) by substituting therefor the alternative restriction prescribed by subsection (5) or by adding thereto or deleting therefrom any Building Authority specified under subsection (1)(a).

(3) No person who is employed by a limited company, building contractor, manufacturer or commercial firm shall be entitled to be registered under this Part.

(4) No registered Building Draughtsman shall practise under the name of a limited company or under the protection of limited liability.

(5) The restrictions referred to in subsection (1)(b) shall be in one of the following forms, that is to say:

(i) he shall be entitled only to submit plans of buildings not exceeding two-storeys in height and not involving reinforced concrete or structural steel framework except lintols not exceeding 2.5 metres in span providing that the total built-up floor area does not exceed 300 square metres in any one project submitted for approval; or

(ii) he shall be entitled to submit plans of buildings not exceeding one-storey in height and not involving reinforced concrete or structural steel framework except lintols not exceeding 2.5 metres in span providing that the total built-up floor area does not exceed 100 square metres in any one project submitted for approval:

Provided that in respect of a Building Draughtsman who was a specially authorized person within the meaning of the Architects Ordinance, 1951, the restrictions imposed on him under this section shall not be less favourable than those which may have been imposed on him immediately before the appointed date.

Provided further that in respect of a Building Draughtsman in East Malaysia who was practising or carrying on business as a building draughtsman for at least twelve months before the appointed date, the provisions of subsections (1) and (5) shall not apply and subsection (2) shall be construed as if all the words appearing after the words 'imposed upon him' had been deleted.

Our understanding of the first proviso is that the restrictions imposed on a building draughtsman under the Act cannot be less favourable than those imposed on a specially authorised person under the Ordinance but this necessarily implies that a building draughtsman cannot claim to have been approved under the Act by a particular building authority which he has not actually included in his certificate of registration as a specially authorised person under the Ordinance.

Learned counsel for the respondents had also referred us to Ipoh High Court Originating Summons No. 41 of 1977 where the questions posed by a firm of engineers against the Lembaga Bandaran Cameron Highlands and the appellant here were whether upon a true construction of the Act and the Engineers Act 1967, there is any provision therein preventing the applicants, who are registered with local authorities for submission of building plans, from continuing to do so and whether upon the true construction of s. 8 of the Engineers Act 1967, with particular reference to sub-s. (2) thereof, the applicants being registered with the first defendant and having been submitting building plans to the first defendant in the past, are entitled to continue submitting building plans to the first defendant subject to the conditions of registration.

The order dated 20 March 1979 was that:

> **IT IS HEREBY DECLARED** that on a true construction of Section 8 sub-section (2) of the Registration of Engineers Act, 1967 the Applicants being registered with the 1st Respondent are entitled to continue submitting building plans to the 1st Respondent for their due consideration subject to the conditions of registration.

He also referred to an originating motion *vide* Ipoh High Court Originating Motion No. 2 of 1977 where the prayer was for an order that pursuant to s. 44 of the Specific Relief Act 1950 the first respondent herein do immediately consider the plans submitted by the applicants against the Lembaga Bandaran Cameron Highlands and the appellant here.

The order, also on 20 March 1979, states:

> **IT IS ORDERED** that pursuant to Section 44 of the Specific Relief Act the 1st Respondent herein do immediately consider the plans submitted by the Applicants:
>
> **AND IT IS ALSO ORDERED** that the 1st Respondent do pay the costs of this motion:
>
> **AND IT IS LASTLY ORDERED** that the Applicants' application against the 2nd Respondent be struck out with no order as to costs.

Learned counsel for the respondents made a valiant attempt to persuade us that these orders may have some bearing on the issues before us. However, we need to appraise ourselves of the fact that the first order relating to the originating summons is with regard to the Engineers Act 1967 and not the Act and the second is made pursuant to the Specific Relief Act 1950. Further, the two orders are in essence a direction for the appellant to consider plans submitted by the two engineers but we fail to see, in the absence of any proper grounds of judgment in that case, how the two orders can be said to be applicable as regards the issues before us. In fact, there is nothing in the two orders that dictate that they are to be binding on other cases involving engineers, architects and building plans. At best, it is only binding on the parties in those two cases.

The prayers in the statement of claim here are for:

(a) a declaration that the plaintiffs are entitled to submit plans to the local authorities in accordance with the approvals granted to them;

(b) an injunction be issued against the defendant restraining them from proceeding with the discriplinary action fixed for hearing on 10th April 1990 or at any time thereafter or from taking any other form of action against the plaintiffs or any of them so long as the plaintiffs acted within the limits set by the local authority concerned;

(c) damages for the loss suffered by each of the plaintiffs as a result of representations made by the defendant against consideration of the plans submitted by the respective plaintiffs;

(d) costs;

(e) further and other relief.

It is our view from a proper reading of s. 6, with the definition of "specially authorised person" in s. 2, of the Ordinance that, for any approval by a particular building authority to be operative, there must be a registration to that effect. A certificate of registration of a specially authorised person must contain a list of all the building authorities he has obtained approval from. As the certificate of registration is renewable annually, updating the certificate should not be a problem. The specially authorised person cannot expect the appellant to recognise a building authority which has given approval but is not included in the certificate of registration.

If a specially authorised person does not possess a certificate or registration as having obtained the approval of a particular building authority under the Ordinance, he is actually not so registered and cannot submit plans to that building authority. It follows that with the coming into force of the Act, he

cannot automatically become a Building Draughtsman for that particular building authority if there has been no registration to that effect under the Ordinance.

Learned counsel for the appellant had also raised the question of misjoinder. On this point the learned trial judge remarked that it was the appellant's contention that there was a procedural flaw in this action as the respondents were not entitled in law to bring this action jointly as even though there was a common question of law between the parties, the reliefs claimed in the action are not, in respect of or arise out of the same transaction or series of transactions. Further, the appellant had pointed out that each respondent had a separate cause of action based on a factually different background.

The learned trial judge referred to O. 15 r. 4 of the Rules of High Court 1980 (hereinafter "the Rules") which reads as follows:

> Subject to rule 5(1), two or more persons may be joined together in one action as plaintiffs or as defendants with the leave of the Court or where –
>
> (a) if separate actions were brought by or against each of them, as the case may be, some common question of law or fact would arise in all the actions, and
>
> (b) all rights to relief claimed in the action (whether they are joint, several or alternative) are in respect of or arise out of the same transaction or series of transactions.

The learned trial judge added that it must be emphasised that the joinder of plaintiffs or defendants is subject to two conditions namely that the right of relief must in each case be in respect of or arise out of the same transaction or series of transactions, and there must be some common question of law or fact.

He concluded that it is abundantly clear that the respondents, who are the plaintiffs in this particular instance, did share a common question of law as to the reliefs claimed by them, mainly for a declaration that they are entitled to submit plans to the local authorities from whom they had obtained the relevant approvals, which have so far been denied to them over a period of time by the appellant, the defendant in the court below. It would from the evidence, he held, fall within the purview of a series of transactions for the purposes of O. 15 r. 4(1)(b) of the Rules. Even if he was held to be wrong on the law in respect of O. 15 r. 4 of the Rules, he added, O. 15 r. 6 of the Rules explicitly states that no suit shall be defeated by reason of a misjoinder. We were in no position to disagree with the learned trial judge on this issue and similarly hold that the issue of misjoinder raised by the appellant here is completely without basis.

Although the arguments of learned counsel for the appellant on the issues of limitation and misjoinder did not find favour with us, we agreed with him on the question of the statutory requirement for registration which is the crux of the appeal. Accordingly, we would allow the appeal with costs here and in the court below. The deposit is refunded to the appellant. The judgment of the court below is set aside with the result that the action is dismissed. Consequently, since the injunction dated 9 April 1990 is now dissolved, we are remitting the matter to the court below for damages to be assessed.